No. 80-120

In the Supreme Court of the United

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH AND NORTHWESTERN LUTHERAN ACADEMY, PETITIONERS

v.

STATE OF SOUTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Federal Unemployment Tax Act requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

2. Whether coverage of employees of parochial elementary and secondary schools in an unemployment compensation program violates the First Amendment.

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INTEREST OF THE UNITED STATES

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states. Because of the federal government's responsibility to administer FUTA, and particularly the Secretary of Labor's responsibility to certify as qualified for these benefits only those states whose statutes conform to federal requirements, the United States has an important interest in this case.

STATEMENT

The issue in this case concerns the proper interpretation of the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and its implementation through the South Dakota Unemployment Insurance Law, Title 61 of the South Dakota Codified Laws Ann. (1978). Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employment by non-profit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). The South Dakota unemployment compensation law contained the same exemptions in almost identical language. In 1976, Congress, in amending FUTA, repealed the third exemption relating to elementary and secondary schools. Thereafter, South

Dakota amended its own statute to eliminate the third exemption. 1977 S.D. Sess. Laws, ch. 420, § 10; see S.D. Codified Laws Ann. § 61-1-10.4(3) (1978).

The Secretary of Labor has interpreted the 1976 amendments to FUTA as requiring that the statutes of qualifying states cover parochial school employees.[1] In May 1978, the South Dakota Department of Labor notified petitioners that employees of their schools are covered under the state unemployment compensation program. Petitioners challenged this determination. After an administrative appeal, and review by an intermediate appellate court, the South Dakota Supreme Court upheld this determination (Pet. App. A-1 to A-24). The court concluded that Congress intended to eliminate the exemption for parochial school employees when it amended FUTA in 1976 (*id.* at A-5 to A-9). Accordingly, it held that petitioners' school employees, other than ministers, are entitled to unemployment coverage under the South Dakota statute.[2] The court further held that the statute, as thus construed, does not violate the First Amendment (*id.* at A-9 to A-16).

SUMMARY OF ARGUMENT

I.

1. In 1976, Congress continued a consistent history of expansion of coverage under the Federal Unemployment Tax Act ("FUTA") by repealing the exemption for

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[1] The term "parochial school" sometimes is used to refer only to schools operated by a parish, but it will be used in this brief in its broader sense to refer to all church-related elementary and secondary schools.

[2] The court made clear in its opinion that this case involves no independent question of state law. The statutory question turns solely on the "congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA" (Pet. App. A-5) because the state statute was intended to treat parochial schools in accordance with the conformity requirements of FUTA. See, *e.g.*, S.D. Codified Laws Ann. §§ 61-1-7, 61-1-18.1 (1978). This case, therefore, squarely presents to this Court the question of the proper interpretation of the federal statute. Cf. *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-515 (1939).

employees of nonprofit elementary and secondary schools, 26 U.S.C. (1970 ed.) 3309(b)(3). The legislative history of the 1976 amendments demonstrates that Congress intended to extend FUTA coverage to all nonprofit schools, including parochial schools. The extension of coverage was designed to provide permanent unemployment protection to substantially all of the nation's wage earners and thus eliminate the need for the temporary Special Unemployment Assistance ("SUA") program established in 1974, which included parochial school employees. Moreover, although Congress was surely aware that the vast majority of nonprofit school employees work in parochial schools, it repeatedly stated that FUTA coverage was being extended to nonprofit schools without ever suggesting that parochial schools were to be excluded. Particularly in light of the fact that the consequence of exempting parochial school employees from the 1976 coverage would have been to leave them without any unemployment protection, because of the elimination of SUA, it is clear that Congress would have said so explicitly if it had intended to exempt them.

Indeed, there is affirmative evidence that Congress intended to extend coverage to parochial school employees. The Senate Report estimated that 242,000 additional employees of nonprofit schools would be added by the 1976 legislation—a number that includes parochial school employees. In addition, Congress manifested its intent to eliminate coverage disparities between similar types of employees, such as between elementary and secondary school teachers and college teachers. There is no doubt that Congress intended in 1970 that church-related colleges be covered under FUTA; only schools devoted to preparing students for the ministry were exempt. Congress' apparent intent to extend FUTA coverage to elementary and secondary school employees on the same basis as employees of institutions of higher education is realized by preserving the same distinction—schools devoted to preparing students for the ministry (and part-time exclusively religious schools, such as Sunday schools) are exempt but other church-related schools are covered.

2. The exemption of Section 3309(b)(1) for employees of a "church" or an organization "operated primarily for religious purposes" is not inconsistent with Congress' intent to extend coverage to parochial school employees. Petitioners mistakenly contend that the "church" exemption plainly extends to parochial school employees if the school is not separately incorporated from the church. However, churches and schools are generally separately organized and recognized as separate entities. In line with this common perception, the Department of Labor has consistently followed its interpretation, issued contemporaneously with the enactment of the Section 3309(b)(1) exemption, that "church" was used by Congress in the limited sense of an individual house of worship. This interpretation accords with Congress' intent in 1976 to cover parochial school employees and presents no administrative problems—individuals employed in the operation of the house of worship are exempt from FUTA coverage but individuals employed in the operation of the school are covered. Petitioners' interpretation, on the other hand, would require a case-by-case inquiry into the corporate form of each school and would result in disparate treatment for schools of different faiths because some religions customarily establish their parochial schools as independent corporate entities. Rather than imputing to Congress the intent to create such an arbitrary system, Congress' expressed intent in 1976 to cover parochial schools should be vindicated by interpreting "church" in Section 3309(b)(1) in terms of a house of worship.

Congress clearly indicated that the Section 3309(b)(1)(B) exemption for organizations "operated primarily for religious purposes" is to be narrowly construed in the context of educational institutions. The Congressional Reports explicitly stated that church-related colleges are not included within this exemption. Only schools devoted primarily to preparing students for the ministry and schools engaged exclusively in religious instruction (such as Sunday schools) are exempt under Section 3309(b)(1)(B).

Great deference should be given to the Secretary of Labor's interpretation of the FUTA coverage requirements because the Secretary is charged with the administration of the FUTA conformity program. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This interpretation was contemporaneously adopted and has been consistently maintained. In its explanation of the 1970 amendments to state agencies, the Department of Labor established that the "church" exemption is to be interpreted in terms of a house of worship. The Secretary has never deviated from this interpretation, and his ruling that the 1976 amendments extended FUTA coverage to parochial elementary and secondary school employees is a logical outgrowth of this interpretation. Moreover, the Secretary's interpretation accords with the well established principle that remedial statutes are to be construed liberally in favor of the workers they are designed to protect.

3. This Court's decision in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), has no application here. First, the extension of FUTA to parochial school employees, which only affects whether payments are made to an individual after his employment relationship with a school has been terminated, raises no serious First Amendment problems akin to those involved in the application of the National Labor Relations Act to teachers in parochial schools. Indeed, it is petitioners' interpretation of FUTA, which makes coverage depend on the corporate form of the school or the degree to which a religious purpose permeates school activities, that raises more serious questions. Second, Congress' affirmative action in repealing the school exemption in 1976 contrasts with the agency initiative involved in *Catholic Bishop*.

II.

1. Because FUTA does not aid religion and is not a step toward the establishment of religion, it does not violate the Establishment Clause of the First Amendment. Moreover, FUTA does not foster excessive governmental entanglement with religion. The only duty imposed on parochial schools under FUTA is to keep certain employ-

ment records, which are considerably less extensive than other recordkeeping requirements that this Court has held not to constitute excessive entanglement.

Petitioners' assertion that FUTA creates unconstitutional entanglement is based upon certain alleged consequences of FUTA coverage that, in fact, would not occur. Because all lay parochial school employees are covered by FUTA, no inquiry need be made into the religious nature of an employee's service. By the same token, a hearing on an employee's eligibility for benefits would not result in entanglement, even if an employee was released on the ground of teaching false doctrine. An eligibility hearing would determine only whether an employee is entitled to benefits; no determination of church doctrine would be made. Indeed, although some inquiry into religious matters for the purposes of resolving secular issues does not violate the First Amendment (see *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972)), even an inquiry into church doctrine would almost never be necessary. A parochial school is free to establish work rules of its choice and an employee may be discharged for violating them; the question whether those work rules or their application correctly reflect church doctrine is irrelevant to the eligibility hearing. Accordingly, FUTA creates only a very minimal degree of church-state involvement, which does not approach the level of an Establishment Clause violation.

2. Because the minimal entanglement involved here in no way hinders petitioners' exercise of their religion, it does not violate the Free Exercise Clause. Although FUTA imposes no tax liability on parochial schools, it does create the possibility of a limited financial obligation on a school if one of its employees collects unemployment benefits. It is well settled, however, that a statute does not violate the Free Exercise Clause merely because it imposes an expense on the practice of religion. The compelling government interest of providing unemployment protection that is advanced by FUTA justifies the minimal entanglement and limited financial ob-

ligations that may result from its extension to parochial schools. The application of FUTA in a religiously neutral fashion to employees of nonprofit schools does not violate the First Amendment.

ARGUMENT

I. FUTA REQUIRES PARTICIPATING STATE UNEMPLOYMENT COMPENSATION PROGRAMS TO PROVIDE COVERAGE TO EMPLOYEES OF PAROCHIAL ELEMENTARY AND SECONDARY SCHOOLS

A. The 1976 Amendments To FUTA Were The Culmination Of A Series Of Congressional Expansions Of FUTA's Coverage

The federal-state unemployment insurance program arose in response to the severe unemployment caused by the Great Depression. To encourage the enactment of state unemployment compensation laws, Congress enacted Title IX of the Social Security Act of 1935, which imposed on covered employers an excise tax consisting of a percentage of wages payable to their employees. However, these employers were allowed a credit against this federal tax liability of up to 90% of their contributions into a fund established under a federally approved state unemployment compensation law. See Pub. L. No. 271, ch. 531, Sections 901-903, 49 Stat. 639-640. All 50 states subsequently adopted unemployment compensation laws that conformed to federal requirements. The federal standards for unemployment compensation coverage remained substantially unchanged for two decades. Beginning in the mid-1950's, however, there commenced a steady expansion of unemployment insurance coverage that has continued to the present day.[3]

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[3] In 1954, for example, Congress reduced the minimum number of employees required for an employer to be covered from eight to four and enacted an unemployment compensation program for federal employees. Pub. L. No. 767, ch. 1212, 68 Stat. 1130. In 1958, Congress extended coverage to ex-servicemen. Pub. L. No. 85-848, 72 Stat. 1087.

The first extension of unemployment coverage directly relevant to this case occurred when Congress enacted the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695. Among other changes, these amendments required state laws, as a condition of certification, to cover employees of nonprofit organizations,[4] state hospitals and institutions of higher education. 26 U.S.C. 3309(a). These employees had previously been excluded under 26 U.S.C. 3306(c)(7), (8). However, Congress also established several exemptions from this expanded coverage, including the exemptions for service performed in the employ of a "church or convention or association of churches," "an organization which is operated primarily for religious purposes" and operated by a church, or an elementary or secondary school. 26 U.S.C. (1970 ed.) 3309(b)(1), (3).

In 1974, Congress determined that the existing coverage under the unemployment compensation system was still inadequate. Accordingly, it enacted, as a temporary measure, the Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845. The Act established a Special Unemployment Assistance ("SUA") program to provide benefits for the approximately 12 million workers who were not protected by the permanent unemployment compensation program, including employees of parochial elementary and secondary schools. State unemployment compensation agencies administered the SUA program, with the federal government assuming the costs of benefits and administration.

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[4] Although the 1970 amendments extended FUTA coverage to employees of nonprofit organizations, they impose no federal tax on these organizations. The definition of "employment" under 26 U.S.C. 3306(c)(8) continues to exclude service performed in the employ of an organization exempt from federal income tax under 26 U.S.C. 501(c)(3). The organization may meet its unemployment insurance obligations under state law either by making regular payments to the state unemployment fund or by reimbursing the fund for compensation paid to the organization's employees. 26 U.S.C. 3309(a)(2).

B. Congress Intended To Extend Coverage To Employees Of Parochial Elementary And Secondary Schools In The 1976 Amendments To FUTA

The Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667, superseded the temporary SUA program and further expanded the coverage of FUTA in several respects, including the repeal of the exemption for employees of elementary and secondary schools previously contained in 26 U.S.C. 3309(b)(3). Congress' concern over FUTA's failure to cover certain classes of employees, which led to the establishment of the SUA program, was the primary motivation for the expansion of coverage in 1976. The House Report specified that the 1976 amendments were designed to "provide coverage under the permanent Federal-State Unemployment Compensation law for *substantially all* of the nation's wage and salary earners and thereby eliminate the need for the temporary Special Unemployment Assistance program." H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 1 (1975) (emphasis added).

Specifically, Congress' concern was "to provide equal treatment of all the nation's wage and salary workers under the permanent unemployment compensation law" (H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 2 (1975)) by eliminating coverage disparities to the extent possible among workers who do the same kind of work. Rep. Corman, chairman of the Subcommittee on Unemployment Compensation of the Committee on Ways and Means, and a principal proponent of the amendments, specifically noted the lack of justification for different treatment under FUTA of workers who do the same kind of work, concluding that "[i]t is time all employees and employers were treated the same under the UC program." 122 Cong. Rec. 22900 (1976). Rep. Ullman, chairman of the full committee, similarly explained that the amendments would "reduce the inequities that currently exist" and "provide workers, who do the same kind of work, the same protection under the unemployment compensation program, regardless of their employer." 122 Cong. Rec. 22518, 22519 (1976). Peti-

tioners' interpretation that teachers in parochial elementary and secondary schools are exempt, although teachers in all public and other private schools, and even in church-related colleges, are covered, is inconsistent with this basic congressional objective.

A substantial number of employees previously covered only by the temporary SUA program were brought within FUTA's coverage by Congress' repeal of the Section 3309(b)(3) exemption for employees of elementary and secondary schools. Congress repeatedly explained that this amendment "require[s] the States to extend the coverage of their unemployment programs to employees of nonprofit elementary and secondary schools." S. Rep. No. 94-1265, 94th Cong., 2d Sess. 2 (1976). See also *id.* at 9-10; H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 2, 6, 41, 56 (1975). The legislative history makes clear that this extension of coverage to nonprofit schools was intended to include parochial schools, which contain approximately 86% of the students enrolled in those schools.[5]

Congress' objective to include employees of nonprofit schools within FUTA's coverage is stated without qualification. There is no indication at all that, despite the use of this broad language, Congress intended to limit coverage to the small minority of nonprofit schools that lack church affiliation. Indeed, the House Report on the 1976 amendments expressly declares:

> Section 115(b) also has the effect of requiring the State to pay unemployment compensation on the basis of services performed for *all* educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education.

H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 56 (1975) (emphasis added). Congress obviously was aware that

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[5] Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. Rev. 847, 847 (1978). See also U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 134 (1976).

parochial schools constituted the overwhelming majority of private elementary and secondary schools, and surely would have said so explicitly if it had intended to exempt them. This is particularly so because, as a result of the elimination of the SUA program, the consequence of exempting parochial school employees in 1976 would have been to eliminate the unemployment protection for these employees that Congress had deemed necessary in enacting and extending SUA.[6] Thus, Congress intended, as it plainly said, to extend FUTA coverage to employees of all nonprofit elementary and secondary schools.

This conclusion is further buttressed by the statistics cited in the Senate Committee Report. In a table listing the groups of employees affected by the 1976 amendments, the Committee estimated that 242,000 additional employees of nonprofit organizations would be covered—a number that corresponds to the total number of employees of nonprofit schools, including parochial schools. S. Rep. No. 94-1265, 94th Cong., 2d Sess. 8 (1976).[7] The source of the 242,000 statistic is not specified in the Report, but the Secretary of Labor has specifically found, based on the record developed in an administrative conformity proceeding, that the statistic was furnished to Congress by the Department of Labor as the Department's best estimate of the *total* number of nonprofit school employees not covered by FUTA prior to 1976, including parochial school employees. 44 Fed. Reg. 64378, 64381 (1979).[8] Petitioners object (Br. 24)

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[6] Congress' concern over leaving these employees without protection is manifested by the fact that, although SUA was originally authorized for only one year, Congress twice extended it until the 1976 amendments became effective. Emergency Compensation and Special Unemployment Assistance Act of 1975, Pub. L. No. 94-95, Section 201, 89 Stat. 240; Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 601, 90 Stat. 2689-2690.

[7] Because the only change in FUTA relating to nonprofit organizations was the repeal of the Section 3309(b)(3) exemption for employees of elementary and secondary schools, this number refers only to *school* employees.

[8] The Secretary's decision in that proceeding to deny certification to the unemployment compensation programs of Alabama and

that certain statistics indicate that there were slightly more than 242,000 teachers in nonprofit schools in 1974, the year on whose data the table in the Report was based, but it is nevertheless clear that the table includes parochial school employees.[9] Because parochial schools contain approximately 86% of the students enrolled in nonprofit schools in the United States, any realistic estimate of nonprofit school employees that excludes parochial school employees would be less than 50,000. Accordingly, there can be no doubt that the 242,000 statistic includes parochial school employees, and that the Senate Report thus indicates that Congress contemplated that the repeal of Section 3309(b)(3) would extend FUTA coverage to those employees.

There is additional affirmative evidence of Congress' intent to extend coverage to parochial school employees. Congress stated as one of the goals of the 1976 amendments the elimination of irrational disparities in unemployment coverage between employees who perform equivalent work (see page 9, *supra*). The extension of coverage to employees of nonprofit elementary and secondary schools was specifically aimed at this goal of providing equal treatment. H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 2 (1975). In line with this goal, both committee reports, immediately after declaring Congress' intent to extend FUTA coverage to employees of nonprofit elementary and secondary schools, noted that existing law required coverage only of employees of institutions of higher education. S. Rep. No. 94-1265, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 56 (1975). In addition, Rep. Corman cited as an

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Nevada was set aside by the Fifth Circuit. *State of Alabama* v. *Marshall*, 626 F.2d 366 (1980), petition for cert. pending, No. 80-922. The court's ruling was based on its interpretation of the statute and did not disturb the Secretary's findings of fact.

[9] Petitioners are apparently referring to Census Bureau data that indicate that there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975. See Pet. App. A-8 n.5. The statistic supplied to Congress by the Department of Labor was obtained from other sources, and the variation between the two numbers is not significant.

example of the inequities to be cured by the 1976 amendments the fact that "[c]ollege teachers have unemployment compensation protection under the permanent program mandated by federal law; high school and elementary school teachers do not." 122 Cong. Rec. 22899 (1976). The 1976 amendments thus were intended to eliminate a disparity in unemployment protection by extending FUTA coverage to elementary and secondary school employees on the same terms as workers employed in higher education.

Congress extended FUTA coverage to college and university employees in 1970 at the same time that it enacted the Section 3309(b)(1) exemption for church employees that is at issue here. As the South Dakota Supreme Court found (Pet. App. A-7 to A-8), the legislative history of the 1970 amendments demonstrates that Congress did not contemplate that the Section 3309(b)(1) exemptions would apply to church-related colleges. On the contrary, Congress made it quite clear that employees of a church-related college were covered under FUTA, with the exceptions of a "college devoted primarily to preparing students for the ministry * * * [or] a novitiate or a house of study training candidates to become members of religious orders." S. Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970); H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969). As the court below noted (Pet. App. A-7), the Department of Labor has followed this mandate and has consistently interpreted the 1970 amendments as requiring coverage of all colleges and universities other than seminaries and novitiates. Thus, the intent in 1976 to extend FUTA coverage to elementary and secondary school employees on the same basis as university employees is realized only if employees of church-related schools, with the exception of schools whose primary function is to prepare students for the ministry (or which are exclusively religious schools, such as Sunday schools), are covered.

C. Section 3309(b)(1) Is Consistent With The Congressional Intent To Extend Coverage To Parochial School Employees

Petitioners contend (Br. 11) that the plain meaning of 26 U.S.C. 3309(b)(1) exempts parochial school employees from FUTA coverage, and therefore the congressional intent in enacting the 1976 amendments is irrelevant. Cf. *State of Alabama* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), petition for cert. pending, No. 80-922. Where legislative history is relevant to the determination of congressional intent, however, this Court has stated repeatedly that it should not be ignored, even if the statutory language appears to be clear on "superficial examination." See, *e.g.*, *Train* v. *Colorado Public Interest Group*, 426 U.S. 1, 9-10 (1976). In any event, far from being clear, the statutory language involved in this case is quite ambiguous.

Petitioners argue that employees of a parochial school are plainly employees of a church, at least where the school is not incorporated as a separate legal entity. It is commonly recognized, however, that churches and parocial schools are separate organizations. For example, teachers at parochial schools are ordinarily thought of as school teachers, not church teachers. Contemporaneously with the enactment of Section 3309(b)(1), the Department of Labor issued an interpretation of "church" that accords with this ordinary conception of churches and schools. In a compilation of materials prepared for the purpose of advising state unemployment compensation agencies what legislative changes and administrative interpretations would be necessary to bring their state programs into conformity with the 1970 amendments to FUTA, the Department of Labor explained that as used in Section 3309(b)(1), "the word 'church' is used in its limited sense and is synonymous with an individual 'house of worship' maintained by a particular congregation." U.S. Department of Labor, *Draft Legislation to Implement the Employment Security Amendments of 1970* at 27, summarized at 1B Unempl. Ins. Rep. (CCH) § 1356,

at 4349 (1977) (hereinafter "*1970 Draft Legislation*"). See Pet. App. A-43. This interpretation of "church" is more consistent both with the common usage of the word and with Congress' overriding goal of bringing as many employees as possible under FUTA's protection than is petitioners' suggestion that the definition of a "church" depends upon its corporate structure.[10]

The manifest congressional intent in 1976 to extend FUTA coverage to employees of all nonprofit elementary and secondary schools is critical to a determination of which of these two possible interpretations is the correct one. The 1976 legislative history clearly indicates that Congress understood the word "church" in Section 3309 (b) (1) to have the narrower meaning ascribed to it by the Department of Labor's interpretation. Otherwise, Congress' intent to cover parochial school employees would be thwarted. This conclusion is reinforced by the fact that Congress made no attempt in 1976 to alter the established interpretation of the Department.

Application of this interpretation presents few administrative problems. Whether or not they are separately incorporated, the house of worship and the school are generally separately organized. Employees who are employed in the operation of the school are covered under FUTA (unless they are exempt as ministers under Section 3309(b) (2)), and those employed in the operation of the house of worship are exempt.[11]

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[10] For example, under petitioners' interpretation, even employees engaged in a profit-making business operated by a church would be exempt from FUTA coverage, although the business's income would be taxable under 26 U.S.C. 511.

[11] Certainly, the record in this case reveals no difficulty in distinguishing between school employees and church employees. The principal of St. Martin's Evangelical Lutheran Church School testified at the administrative hearing in this case that the school staff consisted of himself, one male teacher, four female teachers, and three clerical and maintenance employees, one of whom, a janitor, also worked for the church (Tr. 25, 28). The annual catalog of petitioner Northwestern Lutheran Academy lists all of the institution's employees by name and position (Tr. 34-35).

Adoption of petitioners' interpretation, on the other hand, would create serious administrative problems in addition to defeating Congress' intent to extend coverage to parochial school employees. Petitioners, like many parochial schools, have no corporate existence independent of a church or association of churches. Many other parochial schools, however, are not organized in this fashion.[12] Under petitioners' view, the state would be required to investigate the corporate form of each parochial school in order to determine whether its employees are covered by the unemployment insurance program. More significantly, employees of schools that are similar in all respects, apart from corporate form, would be subject to different treatment under FUTA. There is no basis for ascribing to Congress the intent to create such an arbitrary system, which would allow unemployment insurance protection for school employees to vanish with changes in corporate structure. Rather, "church" should be interpreted narrowly, as it consistently has been by the Secretary of Labor, in order to effectuate Congress' intent.[13]

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[12] For example, approximately 40% of Catholic secondary schools are "administered educationally and financially by religious institutes more or less independently of parish or diocese." J. M. Lee, "Catholic Education in the United States," in *Catholic Education in the Western World* 271 (Lee ed. 1967). Similarly, Jewish day schools are frequently autonomous entities. These schools are "not controlled by any central religious authority. Both the program and administration are directed by a local private group, conducted democratically and responsive to the needs and wishes of its clientele." 2 American Association for Jewish Education, *Jewish Education Register and Directory* 2 (1959). Quaker schools may also be organized in this fashion. See, *e.g.*, Brief of Germantown Friends School and Frankford Friends School as Amici Curiae at 13-17.

[13] Petitioners rely (Br. 14) on interpretations of the word "church" under unrelated sections of the Internal Revenue Code. However, Congress' intent in using the word "church" varies depending upon the purpose of the statutory provision in which it is used, and these other interpretations are of little relevance here. Moreover, "church" exemptions are often given a restrictive reading. See *De La Salle Institute* v. *United States*, 195 F. Supp. 891, 898, 906 (N.D. Cal. 1961) (parochial school is not a "church"

Petitioners also contend (Br. 16-21) that employees of parochial schools are exempt from FUTA coverage on the ground that they are employed by an organization "operated primarily for religious purposes" under Section 3309(b)(1)(B). As the South Dakota Supreme Court found, however, Congress intended that this exemption "be narrowly construed, at least as applied to educational institutions" (Pet. App. A-7). Although parochial schools do serve a religious purpose, they serve other purposes as well. Indeed, the South Dakota appeals referee specifically found that the primary purpose of the schools in this case is not religious, but rather to offer a general education (*id.* at A-43 to A-44). In any event, Congress did not intend the existence of a religious purpose in such schools to be a ground for exempting their employees from coverage.[14]

The 1970 legislative history clearly indicates Congress' view of the limited scope of the Section 3309(b)(1)(B) exemption in the context of educational institutions. A "college devoted primarily to preparing students for the ministry" or a "novitiate" is covered by the exemption, but a church-related college is not. S. Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970); H.R. Rep. No. 91-612,

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within the meaning of 26 U.S.C. (1958 ed.) 511). Here, Congress clearly intended to bring employees of tax-exempt schools within FUTA's coverage, and the language of the pertinent exemptions should be interpreted in accordance with that purpose.

[14] This Court's decisions holding unconstitutional certain forms of governmental aid to parochial schools, on which petitioners rely (Br. 18-20), are not to the contrary. Those decisions involve establishment problems of aid to religious institutions, rather than free exercise claims of exemption from economic regulation designed to benefit employees. The Court therefore made no inquiry into the question whether parochial schools are operated primarily for religious purposes, since the First Amendment prohibits aid to religious activity even if predominantly nonreligious purposes are intermixed with the religious purposes of the activity. Thus, in the school aid cases, the Court's inquiry did not go beyond determining whether there was a "potential for impermissible fostering of religion" in the challenged aid to parochial schools. *Meek* v. *Pittenger*, 421 U.S. 349, 372 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).

91st Cong., 1st Sess. 44 (1969). Similarly, other church-related charitable organizations, such as orphanages or homes for the aged, are not covered by the exemption although they undoubtedly were established and are operated in the furtherance of a religious purpose. *Ibid.* In the context of educational institutions, therefore, Congress' intent in enacting Section 3309(b)(1)(B) would extend to "primarily religious" schools such as novitiates or "Sunday schools," but not to church-related elementary and secondary schools, which provide a general education subject to state certification requirements.[15] Thus, Congress' intent to extend FUTA coverage in 1976 to parochial school employees is entirely consistent with the Section 3309(b)(1)(B) exemption that it passed in 1970.

D. Established Principles Of Statutory Construction Support The Decision Below

1. *The Decision Below Accords Proper Deference to the Contemporaneous and Consistent Administrative Construction of Section 3309*

This Court has established the principle that:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the [interpretation], we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute * * *.'"

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[15] The different nature of elementary and secondary schools is apparent from the extensive state accreditation requirements imposed upon them. The schools are required by state law to provide instruction in a number of secular subjects, which must be taught by state-certified teachers. S.D. Compiled Laws Ann. §§ 13-4-2, 13-33-4 to 13-33-7, 13-33-11, 13-42-2 (1975). Indeed, the schools are generally required to maintain the approval of the state superintendent of elementary and secondary education, who is to "exercise supervision" over the schools. S.D. Compiled Laws Ann. § 13-4-1 (1975).

Udall v. *Tallman*, 380 U.S. 1, 16 (1965). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 107 (1979). Here, the Department of Labor is responsible for administering the FUTA conformity program, and its interpretation of the conformity requirements is entitled to considerable deference. See *AFSCME* v. *City of Cleveland*, 484 F.2d 339, 344 (6th Cir. 1973).

Contrary to petitioners' assertion (Br. 21-22), the Secretary of Labor's interpretation of FUTA is contemporaneous and has been consistently maintained. The Secretary's interpretation of Section 3309(b)(1) that "church" is to be defined in its limited sense as an individual "house of worship"—the interpretation rejected by petitioners—was issued contemporaneous with the 1970 amendments in the *1970 Draft Legislation* sent by the Secretary to state agencies to guide them in bringing state laws into conformity with FUTA requirements. The Secretary has never deviated from this interpretation, and it, accordingly, is entitled to substantial deference. Moreover, Congress' failure to alter this interpretation, which had been in existence for six years, when it passed the 1976 amendments creates an even stronger "presumption in favor of the administrative interpretation." *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932). See also *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Better Business Bureau* v. *United States*, 326 U.S. 279, 286 (1945). As the South Dakota Supreme Court found, the Secretary's post-1976 interpretation that FUTA coverage extends to parochial elementary and secondary school employees "is a logical and necessary extension of the position * * * taken without objection since 1970" (Pet. App. A-9).

Petitioners argue, however, that two memoranda issued by the Department of Labor to state agencies in December 1976 and February 1977 took the position that, notwithstanding the repeal of Section 3309(b)(3), parochial school teachers were still exempt under Section 3309(b)(1). This assertion is incorrect; these memoranda

fully accord with the interpretation consistently espoused by the Secretary since 1970. The December 1976 memorandum (J.A. A-34 to A-36) poses the question whether the 1976 amendments affected parochial schools, and it answers it affirmatively:

> 1. *Question:*
>
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
>
> Yes, to the extent that coverage is extended to elementary and secondary schools * * *.

The memorandum goes on to state that the 1976 amendments did not change the factors that are significant in determining whether employees of such schools qualify for any of the other exemptions in Section 3309(b) and specifically notes that the commentary in the *1970 Draft Legislation*, which includes the definition of "church" in terms of a house of worship, is "still applicable." The February 1977 memorandum (J.A. A-36 to A-39) generally addressed several factors involved in the application of the Section 3309(b)(1) exclusions and indicates no change in the longstanding Department of Labor interpretation of that Section.

In sum, the Secretary of Labor has consistently maintained that educational institutions, other than those engaged in training students for the ministry or those engaged exclusively in religious instruction (such as Sunday schools), are covered by FUTA—including church-related colleges and universities and, after 1976, elementary and secondary schools as well. This interpretation should be accorded deference by this Court.

2. *The Decision Below Properly Construes FUTA to Best Effectuate its Primary Purpose*

The fundamental purpose of a statute is a critical factor in resolving doubts about its proper interpretation. See, *e.g.*, *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969). FUTA, which has its roots in the Depression era, is aimed at minimizing the economic hardships

resulting from unemployment. Such "[r]emedial social legislation * * * is to be construed liberally in favor of the workers whom it was designed to protect." *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir.), cert. denied, 389 U.S. 834 (1967). See also *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *United States* v. *Silk*, 331 U.S. 704, 712 (1947). The corollary of this principle is that exemptions from the scope of such remedial legislation are to be narrowly construed. See *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945); *Wirtz* v. *Ti Ti Peat Humus Co.*, *supra*, 373 F.2d at 212.[16] A narrow construction of the exemptions to FUTA coverage is especially appropriate here because of the consistent history of congressional expansion of FUTA coverage and, in particular, the specific intent of Congress in adopting the 1976 amendments to cover substantially all the employees who were covered under the temporary SUA program, which included parochial school employees. See pages 7-9, *supra*.

E. This Court's Decision In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), Does Not Require That Parochial School Employees Be Exempt From FUTA Coverage

In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that the National Labor Relations Act of 1935 (NLRA) does not apply to teachers in parochial schools. The Court found that application of the NLRA to parochial school teachers would raise "serious First Amendment questions." 440 U.S. at 501-504. Accordingly, the Court ruled that it would not construe the statute as applying to such teachers in the absence of an "affirmative intention of the Congress clearly expressed." *Id.* at 501. After examining the statute and legislative history, the Court concluded that an intent to cover parochial school teachers was not ap-

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[16] In addition, the burden of proof rests on the employer to demonstrate that it falls within the claimed exemption. See *Schultz* v. *Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 67 (5th Cir. 1970).

parent, and therefore it held that the NLRA did not apply. *Id.* at 507.

Catholic Bishop has no application to the present case. First, extension of FUTA coverage to parochial school employees presents no serious First Amendment problems. See point II, *infra.* As the court below found (Pet. App. A-15 to A-16), the minimal church-state entanglement that might result under FUTA does not approach the potential effect on parochial school administration identified by this Court in *Catholic Bishop.* There, the possible imposition of mandatory collective bargaining concerning the teaching mission of parochial schools raised the possibility that the National Labor Relations Board would become involved in "nearly everything that goes on in the schools." *NLRB* v. *Catholic Bishop of Chicago, supra,* 440 U.S. at 503. Here, by contrast, the state would be concerned only with unemployment payments to an individual after his employment relationship with the school had been terminated, which would have no impact on the exercise of the school administration's discretion in operating the school.

Indeed, more serious constitutional questions would be raised by petitioners' interpretation of FUTA than are raised by the Secretary's interpretation. If coverage were to depend upon the corporate form of the school, disparate treatment of different religions might result. See note 12, *supra.* Moreover, petitioners suggest (Br. 16-18) that the determination whether a school is "primarily religious," within the meaning of 26 U.S.C. 3309(b)(1), requires a comparison of the religious and secular aspects of the school, including the degree to which religious teachings permeate the curriculum, which would necessarily involve a much more intrusive inquiry into the school's operations and religious aspects than results from the Secretary's interpretation. See *New York* v. *Cathedral Academy,* 434 U.S. 125, 133 (1977).

Second, there is an "affirmative intention of Congress clearly expressed" here sufficient to meet the *Catholic Bishop* test. In *Catholic Bishop,* the Court noted that the Board unilaterally had altered its practice concerning

private schools although no change was made in the NLRA. 440 U.S. at 497. Here, by contrast, Congress acted affirmatively to repeal the school exemption in 1976, and the Department of Labor's interpretation at issue is a direct consequence of that action. Accordingly, *Catholic Bishop* provides no basis here for deviating from the standard inquiry into congressional intent.

II. FUTA COVERAGE OF PAROCHIAL SCHOOL EMPLOYEES DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners contend (Br. 29-41) that extension of FUTA coverage to employees of parochial elementary and secondary schools violates both the Establishment Clause and the Free Exercise Clause of the First Amendment. Although these two clauses serve a common purpose and may overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962). See also *Abington School District* v. *Schempp*, 374 U.S. 203, 221 (1963). Accordingly, we address each of these contentions in turn.

A. FUTA Coverage Of Parochial School Employees Does Not Violate The Establishment Clause

At the outset, we note that petitioners do not appear to have made out a prima facie claim of an Establishment Clause violation.[17] The Establishment Clause is violated by the enactment of a law that establishes a religion or takes a step that could lead to such establishment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Engel* v. *Vitale*, *supra*, 370 U.S. at 430; see Pet. Br. 29.

[17] Petitioners are basically in the posture of free exercise claimants and make no contentions based on alleged establishment of other religions through aid to other schools. Petitioners' Establishment Clause claims serve, however, to illuminate their free exercise claims and arguably may be raised independently because of this Court's recognition that "the Establishment Clause * * * rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, *supra*, 370 U.S. at 431.

This Court has recognized a three-pronged analysis where a statute raises an Establishment Clause question. A statute "does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster excessive governmental entanglement with religion." *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980). Petitioners contend that the third requirement, excessive entanglement with religion, is violated here. But petitioners do not suggest how the basic prohibition of the Establishment Clause against aid to religion is involved here. Those decisions of this Court that have overturned legislation because of excessive entanglement, or even upheld legislation against an entanglement objection, involved laws that aided religious organizations, to the extent that the laws affected them. See, *e.g.*, *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973) (school aid); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (school aid); *Walz* v. *Tax Commission*, 397 U.S. 664 (1969) (tax exemption). Here, however, the entire thrust of petitioners' argument is that FUTA coverage of parochial school employees hinders, rather than assists, the exercise of religion. Such a claim, in our view, lies only under the Free Exercise Clause. But even if the traditional Establishment Clause analysis were appropriate here, FUTA does not foster an excessive entanglement with religion.

It is not disputed (see Pet. Br. 31-32) that certain contacts between church and state are inevitable, and the question whether entanglement is "excessive" is one of degree. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614; *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674. Here, the only requirement necessarily imposed on petitioners by FUTA coverage (apart from possible contributions to the state unemployment fund discussed *infra*) is the duty under state law to keep accurate employment records, which are subject to inspection by the South Dakota Employment Security Division, and the duty to make related reports to the Division. S.D. Codi-

fied Laws Ann. §§ 61-3-2, 61-3-3 (1978). These records concern such matters as the work hours and wages of each employee; the date each employee was hired and separated from employment; and the total number of employees and wages paid in each calendar quarter. See S.D. Employment Security Division Rules 47:06:02:01 to 47:06:02:06, 9 Unempl. Ins. Rep. (CCH) ¶¶ 6101-6106 (1976). Surely, this routine recordkeeping requirement, which is similar to that associated with withholding income tax from a school's employees (see 26 C.F.R. 31.6001-5), does not violate the First Amendment. Indeed, the recordkeeping involved here is more routine and less extensive than the recordkeeping involved in the reimbursement process in *Committee for Public Education and Religious Liberty* v. *Regan*, *supra*, which this Court held not to constitute excessive entanglement. 444 U.S. at 659-661.[18]

Petitioners' primary constitutional objection, however, is based not on the actual requirements of the unemployment laws, but on certain consequences of the application of those laws that petitioners mistakenly claim would result. Petitioners contend (Br. 32-37) that the degree of state involvement with parochial schools would be "overly severe" in two instances: (1) in determining which services at parochial schools are exempt under Section 3309(b)(1) as "strictly church duties" and (2) in deciding whether an employee is ineligible for unemployment benefits because he was fired for misconduct. These contentions are based on a misunderstanding of the requirements of FUTA; application of FUTA to parochial school employees does not yield the consequences to which petitioners object.

First, contrary to petitioners' assertion (Br. 32-33), FUTA does not require an inquiry into the religious nature of various activities nor into the subject matter of

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[18] In *Regan*, for example, the schools were required to determine the proportionate share of teachers' salaries and fringe benefits attributable to the administration of examinations and recording of data that were required by the State. 444 U.S. at 659-660.

courses taught at the school. All lay parochial school employees [19] are covered by the unemployment compensation system and therefore all lay teachers are covered regardless of whether they teach religious or secular subjects. Thus, no inquiry will be made into questions such as the degree of religious overtones that are placed on otherwise secular subjects such as world history (see Pet. Br. 32-33)—an inquiry that arguably would raise constitutional questions.

FUTA differentiates between employees of the church and employees of the school; it makes no distinction between employees depending on the religious nature of their services. The house of worship and the parochial school are organizationally and functionally distinct, and it is ordinarily a simple matter to determine whether an employee is employed by one or the other.[20] There may be isolated instances where a person has some connection to the school, but is actually employed by the church, for example, where the secretary to the church pastor has an office in the school. This person is not a school employee and therefore is not covered under FUTA, as explained in the Department of Labor's Unemployment Insurance Program Letter No. 39-78, which states that FUTA does not extend to "strictly church duties performed by church employees at the schools pursuant to their church responsibilities" (J.A. A-42). Application of this principle requires no inquiry into religion and, indeed, no extensive inquiry of any kind.

Second, petitioners contend that inquiries into the circumstances of an employee's separation from service impermissibly entangle the state in religious affairs. Although FUTA does not require it, South Dakota denies or reduces benefits to a former employee who quits his job "voluntarily without good cause" or who is dismissed for

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[19] All ministers and members of religious orders employed by parochial schools are exempt under 26 U.S.C. 3309(b)(2).

[20] As noted above, the record in this case discloses no difficulty in distinguishing between the two groups of employees. See note 11, *supra*.

"misconduct connected with his work." S.D. Codified Laws Ann. §§ 61-6-13, 61-6-14 (1978). Petitioners contend (Br. 35) that there are only two possible reasons for the release of one of their teachers—teaching false doctrine or misconduct as defined by church standards—and consequently that an eligibility determination will require an impermissible inquiry into church doctrine.

At a minimum, this contention overlooks the possibility of school closings or reductions in size or programs, which can cause unemployment hardships. In any event, an eligibility determination will never require the state to disturb a church's interpretation of its doctrine. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-710 (1976). The only possible consequence of an eligibility hearing is a decision whether or not a particular employee will receive unemployment benefits. Rather, the focus of petitioners' objection seems to be that an eligibility hearing may involve some inquiry into church doctrine. Even if such an inquiry were necessary, it would not constitute a First Amendment violation. This Court has recognized that some limited inquiry into religious matters may be necessary in the course of resolving certain purely secular issues. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972); *United States* v. *Ballard*, 322 U.S. 78 (1944). Moreover, petitioners' objection is based on a misunderstanding of the nature of the state's inquiry in an eligibility determination. In fact, any inquiry into the nature of church doctrine will rarely, if ever, occur.[21]

The state is not concerned with the content of petitioners' religious beliefs. The eligibility hearing need only

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[21] Petitioners point to no actual claim for unemployment benefits that has necessitated inquiry into church doctrine; their objections are purely speculative. Unemployment coverage of employees of church-related schools, however, is not a new phenomenon. Parochial elementary and secondary school employees universally were covered under the temporary SUA Program from 1974 through 1977, and have since been covered under FUTA in the vast majority of states, which, like South Dakota, have adopted the Secretary of Labor's interpretation. Church-related colleges have been covered since 1970.

determine whether a claimant was discharged for "misconduct" within the meaning of state law. Failure to abide by an established work rule constitutes misconduct. Petitioners are free to establish whatever work rules they choose, including rules that correspond to their religious beliefs. Whether or not those rules correctly correspond to church doctrine is irrelevant; violation of the rules constitutes misconduct. As the court below held (Pet. App. A-14), the state "need only determine whether the employee was fired or laid off."[22] In sum, extension of FUTA to parochial school employees creates only a minimal degree of entanglement between church and state, which does not violate the Establishment Clause.

B. FUTA Coverage Of Parochial School Employees Does Not Violate The Free Exercise Clause

Petitioners also contend (Br. 39) that excessive entanglement caused by the extension of FUTA coverage to parochial school employees violates the Free Exercise Clause. There may be situations where government regulation that can be characterized as entanglement hinders the exercise of religion in violation of the Free Exercise Clause. See *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979). But this is not such a case.[23] As outlined above, FUTA coverage here creates a minimal degree of church-state involvement, and peti-

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[22] Amici States of Alabama and Nevada contend (Br. 26) that testimony might be adduced at an eligibility hearing concerning a discharged teacher's understanding of church doctrine in order to determine whether he "knowingly violated" it. Even if such testimony is necessary in some cases, it would not constitute an Establishment Clause violation. Where an individual's religious understanding or belief is relevant, the courts are foreclosed from determining the "truth" of that belief, but not its existence. See *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

[23] The entanglement here, even to the degree alleged by petitioners, does not approach the scope of the government interference that was held to be unconstitutional in *Surinach*. There, certain Catholic schools were ordered to provide extensive information to the Secretary of Consumer Affairs of Puerto Rico as a step toward the possible imposition of price controls on the schools. 604 F.2d at 74-75.

tioners do not suggest how this contact could hinder the free exercise of their religion.

The program that FUTA and related state statutes establish is extremely limited. It does not affect in any manner the distribution of authority within the school or the establishment of work rules or other terms and conditions of employment. The school's curriculum and its general educational or religious mission are entirely outside FUTA's scope. Nor does the program have any application to the school's personnel decisions, such as whether or whom to hire, fire, discipline or promote, or to the grounds on which those decisions may be made. It comes into play only after the employment relationship has been severed.

FUTA coverage, however, may impose a financial obligation on parochial schools. Unlike for-profit corporations, parochial schools are not subject to federal excise tax under 26 U.S.C. 3301 and are not required to make contributions to the state unemployment fund. If a school elects not to make regular contributions, however, it is obligated to reimburse the state fund for unemployment benefits paid to its employees. 26 U.S.C. 3304(a)(6)(B), 3309(a)(2). It is well settled, however, that a statute does not violate the Free Exercise Clause merely because it "operates so as to make the practice of * * * religious beliefs more expensive." *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). Clearly, the possibility of the limited financial obligation involved here[24] does not create the "coercive effect [on] the practice of religion" that is the crux of a Free Exercise Clause violation. See *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 223.

Moreover, the compelling government interest at stake here justifies the minimal entanglement and limited financial obligations that result from the extension of FUTA coverage. This Court has noted the critical importance

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[24] There is no evidence in this case that petitioners have had to make any payments at all into the South Dakota unemployment fund.

of unemployment benefits; they "provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend'" and are thus essential if the worker is "to maintain [himself] at subsistence levels." *California Dep't of Human Resources* v. *Java*, 402 U.S. 121, 131-132 (1971).[25] And it is beyond dispute that religiously based activities "are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220. This regulatory power extends to parochial schools. It has long been recognized that while the state cannot effectively shut down parochial schools, it may regulate, inspect, supervise and examine them. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). See also, *e.g.*, *Wolman* v. *Walter*, 433 U.S. 229, 240 (1977). In light of these principles, Congress' extension of unemployment coverage to elementary and secondary schools in a scrupulously neutral fashion—treating secular and church-related schools alike—surely does not violate the First Amendment. See *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 788.

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[25] The government interest in easing the economic hardship of unemployment is no less substantial than other interests that this Court has recognized in upholding neutral legislation against a Free Exercise Clause challenge. See, *e.g.*, *Braunfeld* v. *Brown*, *supra* (state law barring retail sales on Sunday); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (state child labor law).

CONCLUSION

The judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted.

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